(2)

No. 02-1295

Supreme Court, U.S.
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In The
Supreme Court of the United States

THE CITIZENS BANK,

Petitioner,

v.

ALAFABCO, INC., DONNIE COTTINGHAM, JOANN BECK and WESTON BECK,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Alabama Supreme Court properly reject an interpretation of the Federal Arbitration Act so expansively broad as to characterize a local commercial transaction alleged to come within its purview as "interstate" in nature merely because a strained analysis of the transaction and parties thereto revealed exposure to activity "involv[ing] interstate commerce" common to any commercial activity?

CORPORATE DISCLOSURE STATEMENT

Alafabco, Inc. has no parent company. Alafabco, Inc. has issued no shares to the public. Therefore, no publicly held company owns any stock in Alafabco, Inc.

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STATEMENT OF THE CASE

This case involves the Alabama Supreme Court's interpretation of Section 2 of the Federal Arbitration Act (9 U.S.C. § 2) in light of this Court's decisions in *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995) and *U.S. v. Lopez*, 514 U.S. 549 (1995). The Alabama Supreme Court attempted to give effect to both decisions of this Court in *Sisters of the Visitation v. Cochran Plastering Company*, 775 So.2d 759 (Ala. 2000), which held that *Lopez*, in dicta, had required a commercial transaction to have a "substantial effect" on interstate commerce before it was subject to regulation. The Alabama Supreme Court held that the "substantial effect" test was applicable to the Federal Arbitration Act and set out a five-pronged test to determine whether a commercial activity had a "substantial effect" on interstate commerce in order to be enforceable under the Federal Arbitration Act. This five-pronged test examined the following areas:

I. Citizenship of the Parties.
II. Tools and Equipment.
III. Allocation of Cost of Services and Materials.
IV. Subsequent Movement Across State Lines.
V. Degree of Separability From Other Contracts.

While the Alabama Supreme Court recognized that "developing a test for determining whether a particular contract has a substantial effect on interstate commerce is difficult," it nevertheless concluded that development of such a test was "essential, because we cannot appropriately say of such an effect, as Justice Stewart suggested we might be able to say of hard-core pornography, 'I know it when I see it' [internal citation omitted]." *Sisters of the Visitation*, at 764.

In the instant case for which Petitioner seeks certiorari, the dispute arose over a series of commercial loan transactions between Petitioner, Citizens Bank, and Respondents, Alafabco, Inc., Donnie Cottingham, Joann Beck, and Weston Beck in which Petitioner loaned Respondents money for various "business operating expenses on construction contracts." (Pet. at 4). As stated by Petitioner, "Alafabco defaulted on its various [original] loan obligations to Citizens Bank and the bank began collection efforts." (Pet. at 4). Citizens Bank and Alafabco, through respective counsel, then negotiated a restructuring of the debt in which "Alafabco provided a security interest in all of its business assets, including accounts receivable, inventory, equipment and motor vehicles." (Pet. at 4). As a part of the overall restructuring, "Three of Alafabco's officers provided personal notes secured by mortgages (Vol. Ex., 6, H) [and] [e]ach debtor also executed on arbitration agreement . . ." (Pet. at 4), which is set out in relevant part in the Petition on pages 4-5. This agreement set out that "The Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of the arbitration agreement. . . ." (Pet at 5).

Subsequently, Alafabco again defaulted on the notes and sought protection by filing a Chapter 11 Bankruptcy Petition in the United States Bankruptcy Court for the Northern District of Alabama. (Pet. at 5). As set out in Petitioner's "Statement of the Case" at page 6 of the Petition:

> Citizens Bank [then] filed a motion in the Bankruptcy Court for adequate protection regarding Alafabco's continued use of the loan collateral. The Bankruptcy Court [in response] entered an order under which Alafabco stipulated to a perfected security interest and lien upon its assets. [internal citations omitted]. The parties once again restructured the loan obligations, executed new loan documents dated December 10, 1999, and the bankruptcy proceedings were dismissed. [internal citations omitted]. This second debt restructuring involved a total amount of approximately $430,000 secured by commercial real estate owned by the individual officers, as well as the business assets of Alafabco. All debtors again signed arbitration agreements virtually identical to the [original] ones. [internal citation omitted].

Due to Petitioner's egregious conduct during the course of its dealings with Respondents, Alafabco subsequently "sued Citizens Bank and three of its officers under various theories including breach of fiduciary duty, breach of implied contract, misrepresentation, negligence, and intentional infliction of emotional distress. [internal citations omitted]." Petitioner then "moved the trial court to compel arbitration pursuant the arbitration agreements executed by each debtor [internal citations omitted]." (Pet. at 6).

As stated in the Petition at page 8, "The trial court found that the loan transactions at issue involved interstate commerce, and entered an order staying the proceedings and compelling arbitration of Alafabco's claims against Citizens Bank. [except, as noted in Petition, as against defendant Charles Coffey] [internal citations omitted]."

Alafabco subsequently appealed the trial court's ruling compelling arbitration to the Alabama Supreme Court. The Alabama Supreme Court reversed the trial court, holding that Respondent Citizens Bank failed to

meet the five-pronged test established in *Sisters of the Visitation*. The Court quite forcefully rejected Petitioner's arguments based on alleged nexi to interstate commerce, considering them extremely remote. Specifically, the Alabama Supreme Court addressed and then rejected what it characterized as "six general categories" by which Petitioner attempted to establish nexi that would justify enforcement of the arbitration agreements under an interstate commerce analysis. The Alabama Supreme Court characterized these "six general categories" as:

> (1) the nature of the Bank's business; (2) the nature of Alafabco's business; (3) the general "course of dealing between the parties"; (4) the use of various communication media in dealings between the parties; (5) the existence of federal regulations; and (6) the nature of the specific transaction at issue. The Alabama Supreme Court then proceeded to an analysis of "these categories in the context of *Sisters of the Visitation*." (Pet., App. A at A9).

The Alabama Supreme Court rejected all six categories of argument offered by Petitioner. Specifically, it rejected categories 1-3, finding that "the overall nature of [Petitioner's] business operations, those of Alafabco, and the course of dealings of the parties . . . [did not justify compelling arbitration and] indeed, these factors are largely irrelevant to an FAA interstate commerce analysis." (Pet., App. A at A10). The Alabama Supreme Court held that "*on its face*, the FAA applies only to transactions, contracts and controversies" and asserted that "The FAA focuses on the narrow concepts of acts, omissions, or agreements, not on the broader concepts on which the bank focuses, such as the nature of the parties' businesses [categories (1) and (2)] or the general 'course of dealings

between the parties.' [category (3)]." Therefore, the Alabama Supreme Court rejected the arguments urged by Petitioner in categories 1-3. (Pet., App. A at A10-A11).

Turning its attention to category 4 (communication media utilized by the parties to the transaction) and category 5 [(ederal regulatory existence), the Alabama Supreme Court rejected Petitioner's attempt to interpret the Federal Arbitration Act so broadly as to characterize these local commercial transactions as "interstate" in nature merely because a standardless analysis of the parties to these transactions revealed exposure to activity "involv[ing] interstate commerce" common to any commercial activity.

Specifically, the Alabama Supreme Court rejected the dubious contention "that involvement of the various forms of communication . . . such as the United States Postal Service and other methods of communication, as well as the existence of federal regulations governing loan transactions and deposits in general" provides sufficient nexi to interstate commerce to compel arbitration under the Federal Arbitration Act. (Pet., App. A at A12).

The Alabama Supreme Court, recognizing the inherent peril in such an expansively overreaching analysis of interstate commerce and the inevitable threat it would pose to the State's ability to exercise any degree of authority over commercial transactions within its borders by legislation, concluded the following:

> The interstate communications services and sundry federal regulations on which the bank seeks to rely touch this transaction so remotely and tangentially as to warrant no consideration. *Holding that a transaction is subject to the FAA*

> *simply by virtue of the ordinary use of interstate communication media in its furtherance, or by Congressional regulation of some aspect of one party's business, would effectively transform every "local" transaction into a "national" one. As Sisters of the Visitation points out, such an approach is impermissible under our federal system of government.* 775 So.2d at 767 *(citing NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). [emphasis added]. (Pet., App. A at A13).

Finally, the Alabama Supreme Court considered the contention of Petitioner in what the court classified as category six ["the nature of the specific transaction at issue"]. The court concluded that if "part of the money specifically involved in the *debt restructuring* was used to finance operations in North Carolina and Tennessee [by Alafabco], then this would involve a valid consideration, and if supported by the record, could afford a basis for arbitrability." (Pet., App. A at A13).

The court then discussed the invoices purporting to evidence the out-of-state work and concluded that "those projects all occurred in 1995, *three years before* the occurrence of any of the events made the basis of Alafabco's complaint or of the alleged defaults that precipitated the debt restructuring. . . . Thus, for all that appears, these transactions had noting to do with this controversy . . . [and therefore] [o]n the state of the record . . . the 1995 projects [were] wholly 'separable' from the subject transaction [and thus failed the fifth prong of the "substantial effect" test established in *Sisters of the Visitation* and noted previously]." (Pet., App. A at A15).

SUMMARY OF ARGUMENT

This petition arose from an attempt by Citizens Bank to compel arbitration of a dispute concerning a series of commercial loan transactions between Citizens Bank and Alafabco, Inc. and the subsequent rejection by the Supreme Court of Alabama of that attempt to arbitrate. Essentially, this case involves the Alabama Supreme Court's interpretation of this Court's decisions in *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995) and *U.S. v. Lopez*, 514 U.S. 549 (1995) as applied to Section 2 of the Federal Arbitration Act (9 U.S.C. § 2) and the requirement imposed by the Alabama Supreme Court that a commercial transaction must "substantially affect" interstate commerce in order to be subject to arbitration under the Federal Arbitration Act. The primary thrust of Petitioner's argument is that "The Alabama Supreme Court improperly reads *Lopez* as requiring that a commercial transaction must not only 'involve' or 'affect' interstate commerce under Section 2 of the FAA, (as set forth in *Allied-Bruce*), but must 'substantially affect' interstate commerce." (Pet. at 13). Petitioner argues that in order to give effect to this "substantial effect" test, "the Alabama Supreme Court's decision would require one to ignore *Allied-Bruce* in favor of dicta in *Lopez*." (Pet. at 15). This argument is disingenuous in the extreme, in that it fails to concede that the Alabama Supreme Court was simply attempting to give effect to both of these important decisions governing the scope of federal authority by reconciling them into a cogent and reliable test. Petitioner ostensibly argues that "the lower court has taken *Lopez*, a case that did not involve commerce or economic activity whatsoever and has superimposed its 'substantiality' language upon every FAA analysis. . . ." (Pet. at 18).

Petitioner actually seeks to exploit a standardless analysis *designed* to reveal exposure to activity "involv[ing] interstate commerce" common to any commercial activity in an effort to force a local commercial transaction within the parameters of "interstate commerce." Petitioner urges this analysis by citing such remote exposure to interstate commerce as the medium of exchange (checks), and the use of the mail and telephones. (Pet. at 7). These practices are necessarily engaged in during the course of most local transactions. This strained analysis was rejected by the Supreme Court of Alabama in its thorough and meticulous examination of the five-pronged test set forth in *Sisters of the Visitation,*775 So.2d 759 (Ala. 2000).

REASONS FOR DENYING THE PETITION

I

THE ALABAMA SUPREME COURT'S RULING DOES NOT CONFLICT WITH *ALLIED-BRUCE TERMINIX COMPANIES V. DOBSON.*

Petitioner argues that "The Supreme Court of Alabama has decided an important issue concerning the phrase 'involving commerce' in Section 2 of the FAA in a manner that runs contrary to language of Section 2 and the established purpose of the Act." (Pet. at 10). Petitioner correctly points out that this Court, in *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265, 273-274 (1995), stated ". . . we conclude that the word 'involving' is broad and is indeed the functional equivalent of 'affecting'." Indeed, this Court stated, at page 275, that ". . . a broad interpretation of this language is consistent with the Act's basic purpose . . ."

Petitioner, however, minimizes other significant language in the opinion and factual background of *Allied-Bruce* which is inconvenient to Petitioner's analysis. One of this Court's primary rulings in the *Allied-Bruce* case was the standard of analysis used to evaluate whether a commercial transaction was subject to the Federal Arbitration Act. This Court concluded that a transaction must involve interstate commerce *in fact* to be enforceable under the Federal Arbitration Act and specifically rejected a "contemplation of the parties" standard. *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265, 278 (1995). Based on the *Allied-Bruce* analysis, a party seeking to compel arbitration (Citizens Bank in the instant case) may fail if the transaction itself cannot be shown to involve interstate commerce. That is precisely what the Alabama Supreme Court found that the Petitioner had failed to show.

Furthermore, Petitioner ignores the factual background of the dispute in the *Allied-Bruce* case. In *Allied-Bruce*, this Court specifically stated, at 282, that:

> The parties do not contest that the *transaction* [emphasis added] in this case . . . involved interstate commerce. In addition to the multistate nature of Terminix and Allied Bruce, the termite-treating and house repairing material used by Allied Bruce in its (allegedly inadequate) efforts to carry out the terms of the Plan, came from outside Alabama.

In other words, the parties in *Allied-Bruce* did not contest the fact that the transaction involved interstate commerce, whereas, in the case at bar, the Respondents consistently maintained that the transactions with the

Petitioner did not "involve" interstate commerce in a manner to invoke the Federal Arbitration Act.

II

THE "SUBSTANTIAL EFFECT" TEST EMPLOYED BY THE ALABAMA SUPREME COURT IS CONSISTENT WITH THIS COURT'S DECISION IN *U.S. V. LOPEZ.*

Petitioner contends that the Alabama Supreme Court incorrectly adopted the "substantial effect" test for interstate commerce as outlined in *U.S. v. Lopez*, 514 U.S. 549 (1995) in its analysis of cases involving the Federal Arbitration Act. Petitioner argues that "This Court did not mention *Allied-Bruce* when it stated in *Lopez* that an activity must 'substantially affect interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause.' *Lopez*, 514 U.S. at 559." (Pet. at 15). That this Court did not specifically cite *Allied-Bruce* in deciding *Lopez* does not support Petitioner's inference that *Lopez* had no effect on the interstate commerce analysis to be employed under *Allied-Bruce*.

Petitioner argues that "*Lopez* involved no economic activity. This Court determined the criminal statute was beyond Congress' power to enact because the statute 'neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce.' *Lopez* 514 U.S. at 551. *Lopez* covered purely intrastate acts, and the issue was not what quantum of evidence would satisfy an interstate commerce jurisdiction prerequisite. Rather, the issue was whether Congress had authority to pass the law." (Pet. at 14).

This analysis of *Lopez* completely fails to address this Court's rejection of the precise brand of overreaching in which Petitioner is engaged in the instant case. While this Court in *Lopez* did hold that the legislation at issue did not involve interstate commerce, it did so only after a scathing rejection of a wildly expansive interpretation of interstate commerce such as is urged by the Petitioner in the instant case. In fact, this Court left little doubt that such an expansive interpretation of the Commerce Clause was wholly inappropriate. Consider this Court's contemplation of the interstate commerce nexus urged by the federal government in *Lopez* and the resoundingly flat rejection with which this argument was met by this Court, fearing an unwarranted federal intrusion into the province of State law:

> The Government's essential contention . . . is that we may determine here that § 922 (q) is valid because possession of a firearm in a local school does indeed substantially affect interstate commerce. Brief for United States 17. The government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are . . . spread throughout the population . . . Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe [internal citation omitted]. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse impact on

> the Nation's economic wellbeing. As a result, the Government argues that Congress could have rationally concluded that § 922(q) substantially affects interstate commerce.

U.S. v. Lopez, 514 U.S. 549 (1995) at 563-564. Essentially, this is an analogous evaluation of "interstate commerce" to that advocated by Petitioner through such remote exposure as the United States Postal Service, checks as a medium of exchange in commerce and the simple use of the telephone, all of which, according to Petitioner, justify forcing a local commercial transaction within the parameters of national "interstate commerce."

This Court bluntly and forcefully rejected such a strained interpretation of "interstate commerce," as propounded by Petitioner, by evaluating the consequences of such a perception of interstate commerce. This Court's distaste for such a wildly expansive view of the commerce clause power is evident in *U.S. v. Lopez*, 514 U.S. 549, 563-564 (1995) wherein the Court stated:

> We pause to consider the implication of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, *regardless of how tenuously they relate to interstate commerce.* [emphasis added] *See* Tr. Of Oral Arg. 8-9. Similarly, under the Government's national productivity reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the government presents in support of § 922(q), *it is difficult to perceive any limitation on federal power*

> [emphasis added], even in areas such as criminal law enforcement or education where States historically have been sovereign. *Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.* [emphasis added].

The concerns expressed by this Court in *Lopez* illustrated the peril of what Petitioner urges is the correct interpretation of Section 2 of the Federal Arbitration Act. In Petitioner's view, the "broad" interpretation of "affecting interstate commerce" in *Allied-Bruce* not only justifies, but *requires* an interpretation of the Federal Arbitration Act so *expansively broad* as to characterize a local commercial transaction alleged to come within its purview as "interstate" in nature merely because a strained analysis of the transaction, and the parties thereto, reveals exposure to some activity "involving interstate commerce" which is common to any commercial activity.

III

THE ALABAMA SUPREME COURT'S "INTERSTATE COMMERCE" TEST IN *SISTERS OF THE VISITATION V. COCHRAN PLASTERING COMPANY* CORRECTLY INTEGRATES THIS COURT'S DECISIONS IN *ALLIED-BRUCE TERMINIX COMPANIES V. DOBSON* AND *U.S. V. LOPEZ* AND WAS PROPERLY APPLIED IN THE CASE BELOW.

In *Sisters of the Visitation v. Cochran Plastering Company*, 775 So.2d 759 (Ala. 2000), the Alabama Supreme Court reconciled this Court's rulings in *Allied-Bruce* and *Lopez*. The *Sisters of the Visitation* opinion discussed this Court's decision in *Wickard v. Filburn*, 317 U.S. 111

(1942), a case which Petitioner cites as authority because "this Court held that Congress could, consistent with the Commerce Clause, regulate wheat produced by a farmer for personal consumption on his own farm . . . and Congress could regulate the activity consistent with the Commerce Clause . . . [and] . . . [t]his Court thus upheld the aggregation approach to testing the effect of a commercial activity upon interstate commerce, as opposed to testing the isolated activity in a vacuum." (Pet. at 15-16).

The Alabama Supreme Court, in considering the *Wickard* decision, concluded that "unless *Wickard* is overruled or read very narrowly, very little that occurs in this country can be viewed as not having some involvement with interstate commerce." *Sisters of the Visitation v. Cochran Plastering Company*, 775 So.2d 759, 761 (Ala. 2000). In *Sisters of the Visitation*, the Alabama Supreme Court considered and rejected an unduly expansive interpretation of *Wickard's* Commerce Clause analysis, stating that:

> One cannot seriously argue that unless all transactions, some of which by themselves might have only a local influence or at most an indirect connection to interstate commerce, come within the scope of the FAA, that act will become some sort of scarecrow, lacking substance and a field of operation, so that Congress's primary purpose will be defeated. Such an expansive application of the FAA would tend to defeat the doctrine of federalism, making that doctrine a hollow shell. To recognize such a wide sweep of federal authority would stifle the State's interest in, or efforts toward, developing creative solutions to other common problems.

Sisters of the Visitation v. Cochran Plastering Company, 775 So.2d 759, 764 (Ala. 2000).

The Alabama Supreme Court concluded that an overly expansive interpretation of *Wickard* was impermissible and sought to give effect to both *Allied-Bruce* and *Lopez*, stating that:

> The [United States Supreme] Court in *Lopez*, after reviewing *Wickard*, acknowledged that it was inappropriate to make an excessively elastic application of the Commerce Clause. It stated that for an economic activity to come within Congress's authority under the Commerce Clause the activity must substantially affect interstate commerce.

The Alabama Supreme Court then embraced the reasoning of the *Lopez* Court and supported its decision by explaining that:

> The *Lopez* Court referred to the requirement of a substantial effect as generally applicable to regulation of economic activity [internal citations omitted]. That broad reference, albeit dictum, does not suggest that the requirement of a substantial effect would not apply to the question whether a particular contract is subject to the FAA.

Sisters of the Visitation v. Cochran Plastering Company, 775 So.2d 759, 761 (Ala. 2000).

Because this interpretation does not impose an interpretation of the Federal Arbitration Act so expansively broad as to characterize a local commercial transaction alleged to come within its purview as "interstate" in nature merely because a *standardless* analysis of the

transaction and parties thereto reveals exposure to activity "involv[ing] interstate commerce" common to any commercial activity, Petitioner resorts to the hyperbolic argument that ". . . to give effect to the Alabama Supreme Court's decision would require one to ignore *Allied-Bruce* in favor of dicta in *Lopez*." (Pet. at 15).

Contrary to Petitioner's assertion, the Alabama Supreme Court, in *Sisters of the Visitation, supra,* at 764-766, gave effect both to *Allied-Bruce* and to *Lopez* by imposing a test for a "substantial effect" on interstate commerce which maintained a broad interpretation of "affecting commerce" by imposing a five pronged test which examines:

I. Citizenship of the Parties.
II. Tools and Equipment.
III. Allocation of Cost of Services and Materials.
IV. Subsequent Movement Across State Lines.
V. Degree of Separability From other Contracts.

The Alabama Supreme Court, after thoroughly examining each of the five prongs established in *Sisters of the Visitation,* concluded that the transactions involved in the case at bar could not support arbitrability of the dispute.

CONCLUSION

For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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